

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue Date: 29 March 2005

CASE NO.: 2004-LHC-1607

OWCP NO.: 08-122886

IN THE MATTER OF

**JOHN DOUCET,
Claimant**

v.

**CHET MORRISON CONTRACTORS, INC.,
Employer**

and

**ZURICH AMERICAN INSURANCE COMPANY,
Carrier**

APPEARANCES:

**Mark M. Zimmerman, Esq.
On behalf of Claimant**

**Lawrence R. Plunkett, Jr., Esq.
On behalf of Employer**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by John Doucet (Claimant) against Chet Morrison Contractors, Inc. (Employer), and Zurich American Insurance Company (Carrier). The formal hearing was conducted in Metairie, Louisiana on January 21, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-8, and Employer's Exhibits 1-9. This decision is based on the entire record.²

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident is disputed;
2. Whether the injury was in the course and scope of employment is disputed;
3. Whether an employer/employee relationship existed at the time of the accident is disputed;
4. When Employer was advised of the injury is disputed;
5. A Notice of Controversion was filed on September 17, 2003;
6. An informal conference was held on March 16, 2004;
7. The average weekly wage at the time of injury is disputed;
8. Nature and extent of disability:
 - (a) Temporary total disability is disputed;
 - (b) Benefits have not been paid;
 - (c) Medical benefits have not been paid;
9. Permanent disability and impairment rating is disputed; and
10. Date of maximum medical improvement is disputed.

¹ The parties were granted time post hearing to file briefs. This time was extended up to and through February 22, 2005.

² The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. ____"; Joint Exhibit- "JX __, pg.____"; Employer's Exhibit- "EX __, pg.____"; and Claimant's Exhibit- "CX __, pg.____".

Issues

The unresolved issues in this proceeding are:

1. Causation, specifically whether Claimant sustained a compensable accident or injury;
2. Whether Claimant's condition is employment related;
3. The extent of any employment related disability;
3. Average Weekly Wage;
4. Attorney fees, penalties, interest and expenses.

Statement of the Evidence **Testimonial Evidence**

John Doucet

Claimant testified that he is forty-five years old, lives in Ragley, Louisiana, and has a third grade education. Claimant began working for Employer on September 25, 2001 as a rigger. He explained that a rigger normally helps the welders with a variety of things that may have to be done while offshore. He stated that riggers use their hands quite often, but now he can do "hardly anything" with his hands.

Claimant recalled that he had been on an offshore hitch for seven days at High Island 179 in 2002, and one of his tasks was to clean out a clogged drip pan. Claimant said that later that evening he felt "a little burning sensation" in his hands but thought nothing of it. The evening that he returned from being offshore, he noticed that his hands were very swollen, but thought perhaps the swelling would go away. The swelling resolved for several days, so Claimant went back offshore when he received a call from Employer to work at High Island 565.

Claimant testified that the sixth or seventh day after he went back offshore in August, his hands began to swell again as well as his ankles. Claimant "let it go a few days," but several days later realized he could not walk on his ankle. Claimant stated he showed Mr. Jon Danzy, who said he would call the office. Claimant said that he was sent in from offshore on August 25, 2002, after completing ten days of work. CX 2, p.179.

Claimant stated that he has not worked for Employer since August 25, 2002. He testified that Employer called him in November 2002 and told him that he

would likely be going offshore that week.³ Claimant called Employer later in the week, on November 12, and was told that the job had been cancelled, so Claimant asked to speak to Cindy Matherne, Employer's safety manager. He said he told Ms. Matherne that he had a problem and explained that his hands had broken out and he needed to see a doctor. He said that Ms. Matherne agreed that he should see a doctor, and he has not spoken to her since.

Claimant testified that when he was on Platform 179 in August 2002, he performed some work in the sunlight. He acknowledged that he was not wearing gloves, though he had some to use. He stated that he did not wear his gloves because he was cleaning drip pans. Claimant said that wearing gloves is required on certain projects, and is strictly enforced on jobs involving working with iron or cable. Tr. 23.

Claimant filed for and received unemployment benefits. He stated that his symptoms have not improved. Claimant identified photographs contained in Claimant's Exhibit 3 as photographs of his hands and feet. Claimant saw Dr. Olivier, a dermatologist on May 7, 2003. Claimant explained that his symptoms fluctuate, for example, his blisters and scabs will heal, but if Claimant goes out in the sun, he breaks out in blisters again. He stated that when he "breaks out," it is difficult for him to do things, and stated if he puts his hands in his pockets the blisters burst, and when they do, they burn and leave a mark. Because of this, Claimant does not believe he can return to his usual occupation, especially if wearing gloves is required.

On cross-examination, Claimant acknowledged that the date of injury listed on his claim for compensation form, completed by him, is "July 2002." EX 1, p.1. Claimant stated that when he completed the form, he could not recall whether he was injured in July or August. Claimant was asked about his statement on the claim form regarding possible chemical exposure. Claimant agreed that it was his contention that his problem was caused by chemical exposure. Tr. 30.

Claimant agreed that the date of injury indicated on the Memorandum of Informal Conference is July 1, 2002. EX 2. Again, he explained that he answered the question to the best of his knowledge. Claimant agreed that EX 7, Claimant's time cards, indicated that Claimant did not work on July 1, 2002. He did not

³ Claimant worked contract jobs, so that his employment was sporadic and during layoffs he would draw unemployment compensation.

dispute that the record showed that he did not work from June 17 through July 4, 2002.

Claimant admitted that he has had four DWI convictions in the past, but denied that he had been fired from a previous job for drinking, stating that he quit the job. Claimant acknowledged Employer's Exhibit 3 as a copy of his application for employment with Employer. He stated that his girlfriend completed the application for him. Claimant agreed that he was not truthful when he stated on the application that he had never been convicted of a crime. He also agreed that his application indicated that he had completed three years of high school but that he testified that he had a third grade education.

Claimant acknowledged that he had previously applied for unemployment compensation while working for Employer. Though he testified that he applied for unemployment after speaking to Ms. Matherne, he agreed that the records located in Employer's Exhibit 8, p. 32, indicated that he applied for unemployment on October 27, 2002, two weeks before the date he alleges he spoke with Ms. Matherne. Claimant acknowledged that an application for unemployment benefits was signed by him, and that he answered "no" to a question regarding whether he had any illness or disability which prevented him from working. Claimant stated that his former legal counsel told him to collect unemployment benefits.

Claimant testified that when he was offshore on High Island 179, his superintendent was Mr. Wayne Poindexter. Claimant stated that on Saturday, either August 10 or 11, was the day he cleaned out the drip pans and was allegedly exposed to chemicals.⁴ Claimant acknowledged that he did not report this incident to Mr. Poindexter because the swelling did not start until he got home, and he thought it would dissipate. He explained that even though his hands were burning before he left the platform, he did not tell Mr. Poindexter, despite the fact he rode in the crew boat with Mr. Poindexter.

Claimant stated that he rode from Galveston, Texas to Lake Charles, Louisiana with Beverly, a welder, whom he told he was "having some problems" with his hands. Claimant stated that Beverly said it would likely go away, which it did, but when the problem resurfaced, he reported it to Mr. Danzy. Claimant acknowledged that during his deposition, when asked if he told Beverly that his hands were bothering him, he replied "No, sure didn't." Tr. 44.

⁴ August 10, 2002 was a Saturday.

Claimant agreed that Employer's policy on accident reporting required workers to report all accidents, no matter how small, and that incidents were supposed to be reported to superintendents. Claimant acknowledged that he did not tell anyone on August 10 or 11, 2002 about his problem. He agreed that he did not report the problem to anyone "in the office" until November 12. Tr. 46. Claimant agreed that after he came in from offshore, he did not see a physician or call Employer to report that his hands were bothering him, because "the swelling went down." Tr. 47.

Claimant returned to work to perform his next job on August 16, 2002 to High Island 565, and worked until August 25. He stated that he performed the same work as other employees and worked normal hours. Claimant acknowledged that prior to going to High Island 565 on August 16, he participated in a shoreside safety meeting with Ms. Matherne, and did not report any problems to her. Claimant explained that at the time of the meeting, the swelling had gone down and he assumed that the problem had resolved, though he admitted he was aware that he was supposed to report all problems.

Claimant stated that while he was at High Island 565 in late August, his hands and feet swelled, and he had some small blisters. Claimant said he had a few blister scars from pulling his gloves off. Claimant acknowledged that he did not mention any blisters on direct examination. Claimant stated that he told Mr. Danzy that his hands and feet were swollen, and Claimant was sent off the platform on August 26, 2002. Claimant stated he did not see a doctor immediately because he arrived at 10:00 at night, but then acknowledged that he did not see a doctor until May 2003. Claimant also acknowledged that after coming in from the platform on August 26, he did not call Employer until November. He agreed that he did not report any accident, injury or illness to Employer until he spoke to Ms. Matherne in November.

Claimant saw Dr. Olivier once in May 2003. He agreed that since he last worked for Employer he has been exposed to sunlight on a daily basis. He stated that his condition has not improved since he last worked for Employer. Claimant acknowledged that during the weeks he was off work while working for Employer before the offshore incident, he may have been exposed to sun while at home.

Claimant said no physician has ever told him how much sunlight exposure is necessary to trigger an outbreak of blisters. He also said that no physician has told him that exposure to chemicals triggered his outbreak. He stated that Dr. Olivier said that his outbreak was caused by exposure to sunlight. Tr. 58. Claimant agreed

that the photographs contained in Claimant's Exhibit 3 were taken in March 2003, and there are no photographs from his initial outbreak.

On redirect, Claimant clarified that during the periods he was not working in July and August 2002, before he began having outbreaks, the time he spent outside involved cutting the grass or gardening. He explained that he has a large shed in his yard where he spent most of the time when he was outside. He stated that he was exposed to "a lot more" sun when he was working as a rigger on a platform.

Claimant testified that it was his regular practice to work for a week or two and then not work for two weeks to a month until he was called back out for another job. Claimant stated that during the times there were no jobs to work, he would collect unemployment benefits.

Claimant stated that when he told Mr. Danzy about his swelling on August 25, Mr. Danzy did not ask Claimant if he hurt himself at work or whether anything at work caused the condition. Claimant said that he did not report "every little ache and pain" he had while working on the platform, nor did he know of any other worker who did so.

Georgiann Vidrine

Ms. Vidrine testified that she is Claimant's "significant other," that she lives with Claimant, and has been with him for seventeen years. Tr. 64. Ms. Vidrine is familiar with the problems Claimant has had, and has noticed some differences in his activities at home. She said that Claimant used to assist her around the house in many ways, worked in the yard, gardened, and worked on the car if necessary. She estimated that Claimant would be outside in sunlight for approximately thirty to forty minutes at a time in performing his activities, because he took breaks to come inside or spent time in the shed.

Ms. Vidrine said currently, Claimant "more or less just sits around." He has problems with his hands swelling, and there are blistered areas on his hands. Ms. Vidrine noted that Claimant appears to have trouble sleeping and does not rest well at night. She said that if Claimant goes outside and it is hot or very sunny, his condition appears to worsen. He complains about his hands and is not able to grip or lift things the way he used to. The neighbors have helped with gardening and mowing the lawn.

Ms. Vidrine testified that Claimant's current condition is "pretty steady" and he has periodic spells of outbreak. It is her opinion that his condition has gotten

worse in the past six months. She said before August 2002, Claimant had never had problems with swelling or outbreaks. Ms. Vidrine stated that she has a telephone bill which indicates that Claimant called Employer on November 12, 2002.

On cross-examination, Ms. Vidrine acknowledged that Claimant's application for employment with Employer was completed in her handwriting. She stated that in completing the application, she read him the questions and indicated his answers. Ms. Vidrine stated that Claimant instructed her to answer "no" regarding whether he had ever been convicted of a crime, and she did so, acknowledging that she knew the statement was not truthful. She said that she wrote down what he told her in answering the question about education.

Ms. Vidrine stated that she was aware that Claimant did not see a physician for his condition until May 2003. She testified that she encouraged him to see a doctor earlier, but he did not do so. Ms. Vidrine stated that to her knowledge, Claimant did not contact anyone from Employer until November 12, 2002.

Jon K. Danzy

Mr. Danzy testified that he works as a superintendent for Employer. He has worked for Employer for nearly ten years and has worked in the offshore construction field for eighteen years. As a superintendent, he is very familiar with Employer's safety policy, and was also familiar with the safety policy of Shell Oil, who was Employer's customer on the job Claimant was working.

Mr. Danzy is familiar with Employer's and Shell's accident reporting policies. He stated that anything, including nicks and scratches, should be reported to the immediate supervisor who determines whether first aid is needed or whether to simply report the incident to the project manager.

Mr. Danzy was the superintendent on the job at High Island 565 in August 2002. He described his duties as superintendent as including ensuring that equipment is on the deck, making sure everything is done safely and according to the drawings, and overseeing the whole job. One of his duties as superintendent is to keep a Daily Field Report ("DFR"). He identified the DFRs contained in Employer's Exhibit 5 as those from the job on High Island 565 from August 16 through August 27, 2002.

Mr. Danzy stated that the job on High Island 565 was the first time he worked with Claimant. He recalled that Claimant was a rigger, which entails

performing “labor-type work” and helping the welders. He said Claimant worked the same hours as the other employees, and that the daily schedule for Shell entailed fourteen-hour work days.

Mr. Danzy testified that while on the High Island 565 job, Claimant did not complain to him about being exposed to any chemicals from a drip pan or about any work-related injury on any prior job, nor did he complain about any work-related injury he sustained on the High Island 565 job. Tr. 83. Mr. Danzy explained that if Claimant had reported an injury, accident or exposure to him, Mr. Danzy would have had to analyze the situation and complete paperwork in connection with the report. He said Shell is “very, very strict” regarding accident reports.

Claimant did make some physical complaints to Mr. Danzy while on the High Island 565 job. He recalled that Claimant told him that Claimant’s feet were swollen and removed his boot. Claimant’s foot was red, so Mr. Danzy gave Claimant an easier job in the “safe welding area.” He stated that tarps were strung in the safe welding area to keep sunlight off the welders and to make the area cooler. Mr. Danzy stated that both he and Claimant thought Claimant might have had gout.

Mr. Danzy testified that Claimant did not show him any blisters when he was on the High Island 565 job, but he remembered seeing tattoos on Claimant’s hands. Mr. Danzy was shown the photographs of Claimant’s hands in Claimant’s Exhibit 3, and he stated that he did not see anything like that on Claimant’s hands while on the High Island 565 job. He stated that if Claimant had shown him blisters like that, as superintendent, he would have analyzed what caused the blisters and administered first aid, which would have been accompanied by paperwork for both Employer and Shell. Mr. Danzy stated that he and a Shell inspector would have had to call the Shell project manager and perform a “root cause” investigation which would “almost shut the job down.” He testified that if he ignored a reported incident like that, he would have suffered repercussions.

When Claimant complained of his swollen feet, Mr. Danzy suggested sending Claimant in from offshore. Mr. Danzy stated that he talked to the project coordinators and Claimant was sent in, though he could not recall whether he was sent in on a boat or a helicopter because both were present at the time. Mr. Danzy explained that for something like a toothache or the flu, which is considered a “home away from home” accident, there is no paperwork required; the incident is reported to the manager and the worker is sent home. Mr. Danzy testified that he

analyzed Claimant's complaints this way. Mr. Danzy stated that he did not know that Claimant was claiming he had been injured on the job until he was contacted by Employer's counsel.

On cross-examination, Mr. Danzy acknowledged that when Claimant showed him the swollen ankle, he did not ask Claimant how it happened. He explained that Claimant approached him early in the morning, and the ankle did not appear to be sprained. Mr. Danzy stated that he had seen chemical burns before, but had not seen swelling associated with chemical exposure. Mr. Danzy agreed that he assumed that Claimant's swollen ankle was not work-related, and the only report he could have made was a first aid report, but no first aid had been administered at that point. He stated that he told his project manager that morning that there was a worker with swollen ankles. He agreed that it was not Claimant's fault that no report was made regarding his ankle.

Maureen Olivier, M.D.

Dr. Olivier was deposed on October 19, 2004. Her deposition and records comprise Employer's Exhibit 9 and Claimant's Exhibits 4 and 5. Dr. Olivier testified that she is a board-certified dermatologist and has practiced in Lake Charles, Louisiana for twenty-one years.

Dr. Olivier examined Claimant once on May 7, 2003. At that visit, Claimant complained of swollen hands and ankles that began a year prior to the visit, which were followed by what he referred to as "water bumps" which burned and left scars. Claimant believed all this had occurred after he had gotten some water on him while offshore. Dr. Olivier examined Claimant and noted he had a very positive tremor of his hands. This concerned her because Claimant indicated on his initial patient questionnaire that he drank beer daily. She also noted Claimant had some intact blisters as well as "erosions" where the top of the blister has come off. She noted these on both hands. There was no redness, swelling or inflammation. Dr. Olivier also noted some healed areas on Claimant's shins.

Based on her examination, Dr. Olivier determined that Claimant had a blistering disorder of the skin, and the most likely diagnosis in her mind at that time was porphyria cutanea tarda (PCT). Dr. Olivier explained that alcohol use can be a causative factor in PCT, and that PCT can be inherited or acquired. The most common form of PCT is acquired most frequently through the use of specific drugs including alcohol. Dr. Olivier said that there may be some genetic predisposition in a person who develops acquired porphyria, but Claimant did not know of anyone in his family who had a similar condition.

Dr. Olivier recommended a biopsy of the skin lesion to submit to a pathologist, blood work, a liver test and a urine sample. The results of these diagnostic studies revealed that Claimant's liver enzymes were very elevated and he had a slightly elevated glucose level; Dr. Olivier noted that sometimes porphyria is associated with diabetes. Claimant's urine porphyrins were extremely high. Based on this information, Dr. Olivier concluded that Claimant's was the cutanea tarda variety of porphyria, and noted that Claimant has liver disease.

Dr. Olivier explained that PCT and liver disease are related in that when the liver is damaged, it cannot perform breakdown of porphyrins properly and, as a result, they accumulate. With a high level of porphyrins in the bloodstream, the skin is very sensitive to ultraviolet light. Dr. Olivier said that it is oversimplifying to say that the liver disease caused the PCT, but the majority of PCT cases she had seen had been associated with alcoholic liver disease. She would not say with certainty that Claimant's liver disease was an alcoholic liver disease without conducting further testing, such as a liver biopsy. She also recommended an evaluation by a gastroenterologist.

Based on the testing she performed and her physical examination of Claimant, Dr. Olivier's "most likely working diagnosis at this time is alcoholic liver disease in possibly a genetically predisposed individual" causing him to have PCT. To her knowledge, Claimant's condition was untreated at the time of the deposition.

On cross-examination, Dr. Olivier clarified that ultraviolet light is what causes the actual blisters. She agreed that working outside all day on a barge could expose an individual to a lot of sunlight, and agreed that it would be a factor in the symptomology of forming blisters on the skin. When asked whether she would restrict Claimant's work, Dr. Olivier said that in individuals with known porphyria, the "number one" treatment is to avoid sun exposure and extreme mechanical trauma to their hands. She said even "a little bit of sun exposure could do it (trigger an outbreak)." EX 9, p.16.

Dr. Olivier's records contain a letter to Claimant dated July 24, 2003 indicating that Claimant's lab results had been received and they had been unable to contact Claimant by telephone. EX 9, p.33. Notations indicate that Dr. Olivier's office had attempted to contact Claimant at least on May 19 and May 22. EX 9, p.31. In a letter to Claimant's attorney dated August 19, 2004, Dr. Olivier stated that Claimant was diagnosed with PCT and some possible causes could be

related to liver disease, excessive alcohol use, or viral infections, and sunlight avoidance should be practiced “until biochemical and clinical remission has been induced.” EX 9, p.35.

Cindy Matherne

Ms. Matherne was deposed on January 11, 2005. She testified that she has worked for Employer since 1991, and in 2002 her position was health and safety manager. Her duties included “managing incidents” and handling accidents, so anytime there was an alleged accident, injury, or claim for compensation, Ms. Matherne handled the situation, including conducting the investigation. EX 8, pp. 5-6.

Ms. Matherne discussed Employer’s accident reporting policy in effect in 2002, and stated that no matter how minor, all accidents and injuries had to be reported, as did “near misses.” She stated that all incidents, work-related and non-work related, were included in the policy. Once an incident was reported, Ms. Matherne would investigate.

Ms. Matherne testified that she reviewed Employer’s records and determined that Claimant never made a claim. She stated that Claimant never made a claim to her personally, and she never had a conversation with him regarding allegations of blisters or any problems with his hand or body. EX 8, pp. 7-8. She stated the first she learned of the claim was from Employer’s attorneys. Ms. Matherne testified that she did not have a telephone conversation with Claimant in November 2002 regarding any alleged incident, and stated that if Claimant had called her, she would have made a record of the call. She stated that she reviewed her records and there is no record of any phone call or conversation with Claimant.

Ms. Matherne stated that a rigger would have a supervisor, and agreed that it is not unusual for a laborer such as a rigger to report either an injury or not feeling well to his supervisor as opposed to Ms. Matherne. She said that if that is the case, the procedure is for the supervisor to report the incident to Ms. Matherne.

Ms. Matherne testified that it is not uncommon in Employer’s offshore department for the availability of work to vary. She stated that Claimant’s personnel file indicated that Claimant was an active employee, able to be called out. When Employer received a notice in the mail stating that Claimant had filed for unemployment compensation due to lack of work, Ms. Matherne stated that was the time Claimant was considered laid off, because Employer responded to the

state's request and confirmed that there was no work available for Claimant. EX 8, pp. 16-17. Ms. Matherne stated that Employer received the notice from the state in November that Claimant had filed for unemployment on October 27, 2002. EX 8, p.17. Ms. Matherne acknowledged that on the prior occasions Claimant had filed for unemployment, Employer also indicated that there was no work available to Claimant.

On redirect, Ms. Matherne testified that Claimant had received a copy of Employer's manual which contained the procedure for reporting accidents, no matter how small. Ms. Matherne said that she participated in new employee training where workers are instructed that they must report any injury and to ensure that a written report is completed. She stated that a "post-orientation test" was contained in Claimant's personnel file, and in response to the question "when should an injury be reported," Claimant indicated "as soon as it occurs." Claimant also indicated on the test that off the job injuries are reported to Employer, and that accident reports are completed for all accidents.

Other Evidence

Claimant's medical records from W.O. Moss Regional Medical Center in Lake Charles are located at Claimant's Exhibit 5.⁵ The records span the period from June 23, 2004 to November 10, 2004.⁶ The records indicate that Claimant presented to the emergency department on June 23, 2004 for a follow-up regarding a foot infection and had been seen in the medicine clinic for injections of Ancef (an anti-infective) and was given Benamid (used to treat gout)⁷ and Bactrim. Claimant complained of pain in the left foot and was diagnosed with impetigo. Claimant had an x-ray of the left foot that day with normal results.

Claimant underwent a chest x-ray with normal results on July 23, 2004. Claimant was treated in the primary care clinic on August 26, 2004 where he was treated for multiple skin lesions. A surgical biopsy was ordered. The treating physician noted no change in Claimant's reported symptoms or physical examination. On September 3, 2004, Claimant underwent a surgical biopsy of a skin lesion from his right forearm. Claimant was referred to dermatology but did not keep his appointment on November 10, 2004.

⁵ W.O. Moss Regional Medical Center is affiliated with the Louisiana State University Medical Center system.

⁶ Many of the notes contained in CX 5 are illegible photocopies of physicians' handwritten notes and the exhibit does not contain page numbers.

⁷ The generic version of Benamid is probenecid.

Notices of Claimant's filing for unemployment compensation are found at Employer's Exhibit 8. One claim was filed October 27, 2002, and Employer's representative, Leslie Naquin, indicated the reason for separation from Employer's employ was no work was available at the time. A previous claim was filed on May 19, 2002, and Ms. Naquin stated there was no work available but Employer would call Claimant when work became available.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Section 12 Timely Notice⁸

Section 12(a) of the Act provides in relevant part:

Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment....Notice shall be given (1) to the deputy

⁸ Though not listed on JX 1 as an unresolved issue, Employer/Carrier raises in their post-hearing brief claims that Claimant failed to give timely notice.

commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

33 U.S.C. § 912(a).

Pursuant to Section 12(a) of the Act, a claimant who sustains a traumatic injury is required to file a notice of injury within thirty days of the date on which he became aware, or should have become aware, of the relationship between his injury and his employment. 33 U.S.C. § 912(a); 20 C.F.R. § 702.212(a).⁹ The claimant is entitled to the presumption that the notice was timely filed, and the burden of establishing that notice was not timely filed is borne by the employer. 33 U.S.C. § 920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

If the employer establishes that notice was not filed in a timely manner, the failure to timely file may be excused by Section 12(d), which provides that such failure to file timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period, or that the employer was not prejudiced by the failure to give timely notice, or that the failure was excused. 33 U.S.C. § 912(d). In order to determine whether a notice of injury was timely filed, the administrative law judge must make a specific determination as to the date on which the claimant became aware, or should have become aware, of the relationship between his injury, his employment, and the likely impairment of his wage-earning capacity. *See Marathon Oil Co. v. Lunsford*, 733 F.3d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Martin v. Kaiser Co.*, 24 BRBS 112 (1990).

In the present case, Claimant testified that he told Mr. John Danzy that he had a problem with his ankle on August 25, 2002. Mr. Danzy's testimony corroborates Claimant's testimony, as does the fact that Mr. Danzy acknowledged sending Claimant home from working offshore. Claimant testified that he did not contact Employer again regarding any work-related injury until November 12, 2002, but Employer's safety manager, Ms. Matherne, denies speaking to Claimant

⁹ As the record contains no evidence that Claimant's was an occupational injury rather than a traumatic injury, I find that Claimant's was a traumatic injury, since there is no evidence that his condition is "peculiar to his particular line of work." *See LeBlanc v. Cooper/T.Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Accordingly, Claimant had thirty days, after awareness, within which to notify Employer of his work-related injury.

on November 12, 2002. Claimant testified that he was aware that his condition was related to his employment at least by November 12, 2002, when he allegedly told Ms. Matherne that he had his hands in water while changing drip pans and had been “breaking out.” Tr. 20 What is clear is that no accident or injury report was ever completed on Claimant’s behalf.

Assuming that timely formal notice of the injury was never given, however, I find that Claimant’s failure to timely notify is excused by Section 12(d). Under Section 12(d), a claimant’s failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge during the filing period, or that the employer was not prejudiced by the claimant’s failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). The employer bears the burden of demonstrating through substantial evidence that due to the claimant’s failure to provide timely notice, it did not have knowledge of the injury and that it was prejudiced by the claimant’s untimely notice. *I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (5th Cir. 1989). It is the employer’s burden to prove by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant’s failure to provide adequate notice. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978). However, a general allegation of difficulty in investigating is not sufficient to establish prejudice. A generalized claim of not being able to investigate while the claim is still fresh is insufficient to prove prejudice. *See I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

Employer/Carrier in this case has not offered any evidence that it was prejudiced by Claimant’s failure to give timely notice, rather in its brief, concludes that there is “no evidence that claimant timely reported...therefore [C]laimant is not entitled to compensation.” Employer’s Brief at 10. Without proving through substantial evidence that it was precluded from investigating some aspect of the claim or rendered unable to provide medical treatment, Employer/Carrier has not established that it was prejudiced by Claimant’s alleged failure to timely notify; accordingly, Claimant’s failure to timely notify is excused pursuant to Section 12(d) of the Act.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused,

aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). In presenting his case, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, he must show that working conditions existed which could have caused his harm. See *Riley v. U.S. Indus./Fed. Sheet Metal Inc.*, 455 U.S. 608, 14 BRBS 631 (1982).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary, that Claimant's injury was not work-related. 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, I find that Claimant has invoked the Section 20(a) presumption. First, Claimant has established that he suffered a harm, specifically that he had swelling in his ankles and broke out in blisters. Dr. Olivier subsequently diagnosed Claimant with PCT. Second, Claimant has established that he worked on an offshore platform and worked up to fourteen-hour days. Claimant testified that some of these days were spent working in the sun. Dr. Olivier testified that sunlight is what triggers blisters in PCT, and that a symptom of PCT is swelling in the extremities. Accordingly, Claimant has established that working conditions existed which could have caused his harm.

Therefore, the burden shifts to Employer/Carrier to produce substantial evidence to the contrary; and Employer/Carrier has introduced no evidence that Claimant did not suffer a harm, rather Employer/Carrier argues that Claimant's injury is noncompensable. In other words, there has been introduced no evidence which would contradict Dr. Olivier's testimony that sunlight causes skin sensitivity in individuals with PCT, and that working on an offshore platform could have been a factor in the symptomology exhibited by Claimant. Employer/Carrier focuses on the underlying cause of Claimant's harm in arguing that his employment did not *cause* his condition.

It is well established that if a Claimant has a preexisting or underlying condition, and working conditions aggravate that condition, the resulting disability is compensable.¹⁰ See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59, 61 (5th Cir. 1998) (noting that ALJ “erroneously focused on the origins” of the claimant’s underlying heart condition and that an LHWCA employer generally takes his employees as he finds them); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157, 159 (1990) (stating that an “injury” for purposes of the Act includes one “occurring gradually as a result of continuing exposure to conditions of employment,” and “it is sufficient if the employment aggravates the *symptoms* of the process) (emphasis added). Further, Employer sets forth arguments similar to those made by the employer in *Crum v. Gen. Adjustment Bureau*, 12 BRBS 458 (1980), *aff’d* 738 F.2d 474 (D.C. Cir. 1984) who asserted that claimant’s chest pains were not compensable under the Act, and the Board held in *Crum* that although there was no evidence of a relationship between the claimant’s employment and his underlying condition, he was entitled to compensation for disability caused by his work-related symptoms. *Crum*, 12 BRBS at 462.¹¹

Therefore, I find that Claimant has invoked the Section 20(a) presumption because he has established that he suffered a harm and that working conditions existed which could have caused his harm. Employer has not rebutted the presumption with substantial evidence to the contrary.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

¹⁰ Employer/Carrier assert that Claimant’s injury is not compensable either as a traumatic injury or as an occupational disease. Claimant states that there is “no reason why” his condition could not be considered an occupational disease. Claimant’s Supp. Brief at 1. However, occupational disease is inapplicable in the present case because in order to qualify as such, the disease must be particular to the claimant’s line of work. See, e.g., *LeBlanc v. Cooper/T Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997). The majority of occupational disease cases involve conditions such as asbestosis or a breathing disorder, *Osmundsen v. Todd Pac. Shipyard*, 755 F.2d 730 (9th Cir. 1985); and hearing loss, *Cox v. Brady-Hamilton Stevedore Co.*, 5 BRBS 186 (1985).

¹¹ Employer/Carrier also attacks Claimant’s credibility. Despite several inconsistencies in his testimony, I find Claimant to be credible. He answered honestly regarding his past convictions and admitted he was not truthful when completing his job application.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). In this case, there is no medical opinion which states Claimant has reached maximum medical improvement. In fact, Dr. Olivier wanted further testing and a liver biopsy performed, and wanted Claimant to be evaluated by a gastroenterologist. Therefore, any compensation awarded will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, there were no restrictions placed on Claimant until October 19, 2004, the date Dr. Olivier was deposed. Claimant testified that after he was sent in from offshore on August 25, 2002, Employer contacted him in November 2002 and told him there would be work available to him the following week. Claimant stated that he contacted Employer on November 12, 2002 and was told that the job had been cancelled. Claimant thereafter, as he usually did, collected unemployment compensation. Therefore, I find that Claimant's

willingness to return to work in November 2003, combined with his not seeking medical care until May 2003, is indicative of the fact that he was not aware of any incapacity of earning wages during this time.

There is no mention of either work restrictions or removal from work in Dr. Olivier's notes. It was not until October 19, 2004 that Claimant received any restrictions or instructions relating to his return to work, and then he received only vague restrictions from a physician who had seen him one time and included for the first time, restrictions in her deposition testimony. Specifically, Dr. Olivier stated: "I think in a patient with known porphyria cutanea tarda that they'd definitely [sic] number one treatment is to avoid sun exposure and extreme mechanical trauma to their hands." EX 9, p.16. Consequently, because there is no medical evidence to contradict Dr. Olivier's opinion, I find that these restrictions were effective on October 19, 2004.

Claimant testified that he performed some of his work in the sun, and that he frequently used his hands. As a rigger, whom Mr. Danzy described as a worker who performs "labor-type work" and assists welders, I find that Claimant has established he cannot return to his usual employment as a rigger given Dr. Olivier's restrictions. Therefore, the burden shifts to Employer/Carrier to establish the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

In this case, Employer/Carrier introduced no evidence of suitable alternative employment after restrictions were placed on Claimant. Because Employer/Carrier did not carry its burden, Claimant remains totally disabled under the Act.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power

at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 320 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment, not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. Gen. Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10(a) should apply. *Duncan v. Wash. Metro. Areas Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was "substantially the whole year" where the work was characterized as "full time," "steady" and "regular.") The number of weeks should be considered in tandem with the nature of the work when deciding whether the claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-56 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment but did not work the whole of the year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (5th Cir. 1991). Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in same or similar employment, in the same or neighboring place.

Section 10(c) is a catch-all to be used in instances where the methods in 10(a) and 10(b) cannot realistically be applied. 10(c) is used where the claimant's employment is seasonal, part-time, intermittent or discontinuous, or where 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Empire Untied Stevedores*, 936 F.2d 819 at 823, 25 BRBS at 26. Section 10(c) is also applicable where there is insufficient evidence in the record to make a determination of average daily wage under either 10(a) or 10(b). *Sproull*, 25 BRBS at 104; *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 140 (1990).

Here, the parties agree that the correct method of computation to determine Claimant's average weekly wage is 10(a), because Claimant worked for Employer "substantially the whole of the year" immediately preceding the injury. The parties agree that Claimant worked for Employer for thirty-three weeks and earned

\$23,455, and that he was a six-day per week worker. The evidence supports the parties' agreement. The parties do not agree, however, on the resultant amount arrived at by using this method of computation. Employer/Carrier asserts that Claimant's earnings should be divided by 198 (thirty three weeks times six days per week) to ascertain his average daily wage, which multiplied by 300 is \$35,537.88 and when divided by fifty-two results in an AWW of \$683.42. Claimant, on the other hand, asserts that his earnings of \$23,455 should be divided by 150 (the number of days he worked) and multiplied by 300 which produces \$46,909.99, and when divided by 52 yields an AWW of \$902.02.

While I believe that the parties used the correct formulas, I disagree with both parties' results. Section 10(a) instructs that a claimant's average weekly wage should consist of three hundred times his average daily wage if he is a six-day per week worker. 33 U.S.C. § 910(a). To ascertain a claimant's average daily wage, his earnings for the year must be divided by the number of days he actually worked. A tallying of the days reflected on Claimant's timesheets, located at Employer's Exhibit 6, reveals that he worked 175 days. Accordingly, his AWW is \$733.19.¹²

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer controverted on September 17, 2003. Therefore, as Employer has not paid compensation within 14 days of learning of injury, § 14(e) penalties are assessed against Employer.

¹² Claimant's earnings of \$23,455 are divided by 175 and yield an average daily wage of \$134.02. The average daily wage is multiplied by 300 and divided by 52 (\$40,206 divided by 52) and results in an AWW of \$773.19.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from October 19, 2004, and continuing based on an average weekly wage of \$733.19;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of September 23, 1997;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 29th day of March, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd